Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

HECTOR ARISTIS ALMANZAR DURAN, a/k/a Aristides,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Certiorari should be granted to determine:

1. Whether the admission of improper evidence identifying the petitioner as the individual sought by the agents violated the petitioner's right to due process of law?

2. Whether trial counsel's representation and performance at trial violated the petitioner's Sixth Amendment right to effective assistance of counsel and affected the outcome of the petitioner's trial?

3. Whether the admission of similar act evidence regarding other narcotics sales pursuant to Fed. R. Evid. 404(b) and 403 was clearly erroneous and violated the petitioner's right to due process of law?

4. Whether the denial of petitioner Hector Aristis Almanzar Duran's right to testify in his own defense at trial violated his right to due process of law?

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Second Circuit's opinion in this matter was filed on December 17, 1997. This Court's jurisdiction is invoked under Title 28, United States Code § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitutional Amendments V, VI are set forth in Appendix C.

Federal Rule of Evidence 404(b) and 403 are set forth in Appendix D.

Petitioner Hector Aristis Almanzar Duran respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

STATEMENT OF FACTS

This petition for certiorari concerns whether the Second Circuit Court of Appeals deviated from established Constitutional and case precedent in denying petitioner Hector Aristis Almanzar Duran's claims that the district court improperly admitted hearsay evidence at trial implicating the petitioner as the individual sought by the agents in a historical investigation, violating petitioner Hector Almanzar Duran's right to due process of law under the Fifth Amendment; that trial counsel was ineffective in violation of the Sixth Amendment; that the trial court erred in admitting prejudicial 404(b) evidence; and that the Petitioner was denied his right to testify in his own defense.

A. Background

Petitioner Hector Aristis Almanzar Duran was arrested on September 26, 1995 and arraigned on an indictment which charged violations of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(B), for an offense which allegedly occurred one and one-half years prior to his arrest. The agents

testified that on May 5, 1994, they were conducting an undercover operation in which they were to sell four kilograms of cocaine to Manuel Aristedes. At the time of the purchase, the agents claimed that petitioner Hector Aristis Almanzar Duran momentarily appeared after the deal had been negotiated and at the time of the money transfer. The agents believed that petitioner Hector Aristis Almanzar Duran provided some of the funds to purchase the drugs.

At trial, the primary issue was whether the petitioner Hector Aristis Almanzar Duran was in fact the individual who was present in a meeting with the undercover agents in May 1994. The agents had no identifying data for the man who was present, but evaded arrest that day. In order to bolster its case, the prosecution inculpated petitioner Hector Aristis Almanzar Duran by making it clear to the jury that a non-available and non-testifying informant had identified and located petitioner Hector Aristis Almanzar Duran, one and one-half years after the charged conduct, as the individual the Special Agents sought.

B. The Petitioner's Arrest and Agent Reyes' Testimony Regarding the Confidential Informant's Identification

Over objection, the Special Agent Raphael Reyes testified that on the day of petitioner Hector Aristis Almanzar Duran's arrest, September 26, 1995, the confidential informant telephoned him. Testimony made clear that the confidential informant had located petitioner Hector Aristis Almanzar Duran. Thereafter agent Reyes guided all the members of the group to petitioner Hector Aristis Almanzar Duran. (Tr. 247-251)[1]. Agent Reyes thereafter spoke with members of his group and his group supervisor before they went to pick-up the confidential informant. (Tr. 247-251).

Agent Reyes testified that after he received the telephone call from the confidential informant on September 26, 1995, he immediately picked-up the confidential informant with Special Agents Mike Cole and Carl Bell, and went to a location where petitioner Hector Aristis Almanzar Duran was arrested. It was clear the confidential informant

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1. The prefix "Tr." refers to the transcript of the trial held before the Honorable Sonya Sotomayor, United States District Judge for the Southern District of New York, in January 1996, followed by the page number.

had informed him the alleged participant of the May 5, 1994 transaction was standing on 142nd Street and Riverside Drive, Manhattan, New York. In responding to the confidential informant's information, Agent Reyes testified at the *Wade* hearing, "he mentioned to me that he was wearing dark brown or brownish jeans with a long-sleeved shirt, and that he was the individual who I had prior negotiations with." (W. 13)[2].

Nonetheless, Agent Reyes testified at trial that he observed petitioner Hector Aristis Almanzar Duran "approximately about 30 seconds, 45 seconds" before he made the identification on September 26, 1995. (Tr. 317; W. 16). Agent Reyes also testified he allegedly observed the perpetrator for only several minutes during a prolonged negotiation and transaction with others that occurred one and one-half years prior to petitioner Hector Aristis Almanzar Duran's arrest in May 1994.

To incorporate the conclusions of the informant into its case, the prosecution began by introducing an extensive history by the agents to find the perpetrator who had escaped them on May 5, 1994, one and one-half years before petitioner Hector Aristis Almanzar Duran's arrest. Agent Reyes testified at length to these efforts, including trips by himself and other agents to the locale where petitioner Hector Aristis Almanzar Duran was arrested and that neither he nor other agents went inside the bodega where petitioner Hector Aristis Almanzar Duran was arrested. (Tr. 244-247). Agent Reyes' testimony made clear that it was the confidential informant who had located and identified petitioner Hector Aristis Almanzar Duran in Washington Heights, New York on September 26, 1995. (Tr. 247-251). Apparently, by the time the *Wade* hearing was conducted, the confidential informant was now unfindable and unavailable to both sides.

The prosecution was clearly aware that it had stepped over the line of admissibility, because thereafter the prosecutor went out of his way to point out that the informant did not say anything at the bodega itself. (Tr. 251). However, it was crystal clear that the informant had told the

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2. The prefix "W." refers to the transcript of the pre-trial *Wade* hearing held before the Honorable Sonya Sotomayor, United States District Judge for the Southern District of New York on December 7, 1995, followed by the page number.

agents where to find petitioner Hector Aristis Almanzar Duran and provided a physical description of what he was wearing.

The district court was concerned about this issue, as it noted in the record, that

> This issue of potential bolstering was very clearly in the court's mind, and I have a distinct recollection of [trial counsel] raising this question at a pretrial conference at some point . . . and I have an equally distinct memory of instructing [the prosecutor] that he walked a very fine line in insuring that there was no bolstering attempt.

(W. 2-4).

The record makes clear that the informant was unavailable at the time of the trial. The record indicates that trial counsel attempted to contact the confidential informant through his counsel, but was unsuccessful. (Tr. 370, 428). The prosecution stated that it did not have control over the confidential informant, and called Special Agent Jones to confirm that fact, further signaling the jury as to why it should rely on the hearsay testimony of the informant. (Tr. 370-371). Just prior to the summations, the prosecution continued to make clear to the district court it could not locate the informant. The prosecution speculated to the court that, "Mr. De La Cruz might be in jail at the moment not on federal charges, but on state charges." (Tr. 429).

The prosecution in its summation highlighted the absence of the confidential informant, clearly telling the jury that informant's identification was correct and that had the confidential informant testified at trial he would have confirmed the prosecution's case.

Agent Reyes further bolstered the confidential informant's credibility and the reliability of his observations and conclusions by testifying that the confidential informant's information provided in the instant case was so valuable that he was paid for it. (Tr. 201).

C. Ineffective Assistance of Counsel

Petitioner Hector Aristis Almanzar Duran's trial counsel was ineffective. Trial counsel failed to object to the introduction of similar

act evidence mentioned in the prosecution's opening and which was then admitted in its direct case, failed to move to suppress pre-trial identifications of petitioner Hector Aristis Almanzar Duran from photo-arrays, was unprepared and confused on several occasions prompting comment from the district court and implicated his own client during his inadequate and ineffective cross-examinations.

Petitioner Hector Aristis Almanzar Duran's defense was further undermined by trial counsel during the cross-examination of Special Agent Rafael Reyes. Trial counsel repeatedly (Tr. 259, 260-262, 263, 270, 309) could not effectively formulate questions for cross-examination and instead implicated petitioner Hector Aristis Almanzar Duran as the individual sought by the agents for the May 5, 1994 transaction.

The trial record shows frequent instances of trial counsel's lack of preparation. One instance of this unpreparedness is indicated by trial counsel's failure to obtain the cooperating witness Pedro Gonzalez's financial affidavit which was filed with the district court to use during the cross-examination of the witness. (Tr. 84). The district court commented on this debacle by stating trial counsel should have requested this document the week before. (Tr. 105).

Additionally, during the cross-examination of Pedro Gonzalez, trial counsel's inadequate investigation of the cooperating witness manifested. Cooperating witness Pedro Gonzalez testified that he was arrested in 1993 after police officers planted drugs on his person and assaulted him. (Tr. 135-137). Pedro Gonzalez went on further to reveal that he, not his attorney, resolved this New York State Supreme Court case, and that he entered a guilty plea for a probationary sentence despite his innocence. (Tr. 135-137).

Also during trial, trial counsel raised for the first time that he did not have any notes from any proffer sessions the cooperating witness attended. (Tr. 105). A review of the trial record indicates that trial counsel's arguments clearly confused both the court and jury.

In the instant case, trial counsel also failed to move for suppression of two pre-trial identifications made of photo-arrays testified about at trial identifying the petitioner Hector Aristis Almanzar Duran as the

participant in the May 5, 1994 transaction who evaded arrest. Disquieting by its absence from the pre-trial identification hearing was any mention of the photo-arrays identified by Special Agent Namon Jones and cooperating witness Pedro Gonzalez in November and December 1995, respectively. These identifications were testified about at trial (Tr. 63, 385) and were relied upon by the jury in determining whether petitioner Hector Aristis Almanzar Duran was indeed at the location of the transaction on May 5, 1994.

Trial counsel failed to object to the prosecution's opening which stated, "This is a case about an individual who used the grocery store where he was working not to sell groceries but to buy and sell cocaine." (Tr. 15). This reference to narcotics dealings by petitioner Hector Aristis Almanzar Duran out of the grocery store or "bodega" was impermissible, as it did not relate to the charges in the indictment before the district court, but to the forthcoming testimony of cooperating witness Pedro Gonzalez regarding other transactions petitioner Hector Aristis Almanzar Duran allegedly conducted as a member of a drug distributing organization "Los Camposinos". (Tr. 46-58).

The district court realizing that trial counsel did not object to the prosecution's opening attempted to avoid this issue by, *sua sponte* instructing the jury that this evidence was coming before the jury for background. (Tr. 21, 22). Moreover, the district court failed to do the necessary balancing analysis required for admission under Fed. R. Evid. 404(b) and 403. (Tr. 21, 22).

D. Petitioner's Right to Testify in His Own Defense

Additionally, both before and during trial, petitioner Hector Aristis Almanzar Duran, specifically stated to his trial counsel that he wished to testify in his own defense to contradict the prosecution's case and to explain to the jury that he was not the individual the agents sought. (A. 155). Other conversations about the petitioner testifying at trial occurred between petitioner Hector Aristis Almanzar Duran, his wife Awilda Almanzar-Duran, and trial counsel. In response to petitioner Hector Aristis Almanzar Duran's request, trial counsel on each occasion said that he did not want petitioner Hector Aristis Almanzar Duran to testify. The petitioner contends that trial counsel never told petitioner

Hector Aristis Almanzar Duran that the decision to testify was the petitioner's decision to make alone, and that trial counsel could not stop petitioner Hector Aristis Almanzar Duran from testifying on his own behalf. Additionally, this issue is also urged as a basis to establish trial counsel's ineffective assistance.

E. Appeal to the United States Court of Appeals for the Second Circuit

The Second Circuit Court of Appeals, (Honorable Frank X. Altimari, Honorable John M. Walker, Honorable Jose A. Cabranes) denied petitioner Hector Almanzar's appeal. The Second Circuit decided that the testimony of Agent Reyes did not reveal the contents of any conversation he may have had with the confidential informant, and that the testimony did not violate established Second Circuit precedent such as *United States v. Figueroa*, 750 F.2d 232 (2d Cir. 1984) and *United States v. Check*, 582 F.2d 668 (2d Cir. 1978). Additionally, the court decided that the 404(b) evidence that was admitted at trial was properly admitted. The court was silent as to the other issues the petitioner raised.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because:

1. The admission of improper evidence identifying the petitioner as the individual sought by the agents violated the petitioner's right to due process of law.

2. Trial counsel's representation and performance at trial violated the petitioner's Sixth Amendment right to effective assistance of counsel and affected the outcome of the petitioner's trial?

3. The admission of similar act evidence regarding other narcotics sales pursuant to Fed. R. Evid. 404(b) and 403 was clearly erroneous and violated the petitioner's right to due process of law?

4. The denial of petitioner Hector Aristis Almanzar Duran's right to testify in his own defense at trial violated his right to due process of law?

ARGUMENT

I.

THE ADMISSION OF IMPROPER EVIDENCE IDENTIFYING THE PETITIONER AS THE INDIVIDUAL SOUGHT BY THE AGENTS VIOLATED THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW AND REQUIRES THAT THE PETITIONER RECEIVE A NEW TRIAL.

The petitioner Hector Aristis Almanzar Duran was arrested on September 26, 1995, one and one-half years after the charged conduct in the instant case allegedly occurred. Central to the defense of petitioner Hector Aristis Almanzar Duran was whether or not the witnesses identified petitioner Hector Aristis Almanzar Duran as the man they claimed they saw on May 5, 1994. The identification of petitioner Hector Aristis Almanzar Duran turned on brief viewings of the perpetrator by one agent and one other individual, a confidential informant for the prosecution.

In order to bolster the identifications of the agent, the prosecution sought to introduce, indirectly, the observations and conclusions of an "unavailable" informant without calling him as a witness at trial. It was clearly improper for the prosecution to attempt to incorporate this "inadmissible hearsay information obviously supplied by and emanating from the informant." *United States v. Figueroa*, 750 F.2d 232 (2d Cir. 1984); *citing United States v. Check*, 582 F.2d 668 (2d Cir. 1978). The admission of this testimony allowed the jury to improperly conclude that the confidential informant identified petitioner Hector Aristis Almanzar Duran on September 26, 1995 and that identification improperly corroborated the identification of petitioner Hector Aristis Almanzar Duran by Agent Reyes earlier that same day[3].

The Second Circuit decided that the testimony of Agent Reyes did not reveal the contents of any conversation he may have had with the confidential informant. Accordingly, the Second Circuit denied the

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3. Appellate counsel raised the *Check* issue before the district court as a Fed. R. Crim. P. Rule 33 motion, which was denied by the district court on December 12, 1997.

petitioner's appeal. However, it is apparent that the Second Circuit's decision deviated from established Second Circuit precedent such as *United States v. Figueroa*, 750 F.2d 232 (2d Cir. 1984) and *United States v. Check*, 582 F.2d 668 (2d Cir. 1978). Accordingly, in light of the Second Circuit's failure to follow established case law, it is requested that the petitioner's Writ of Certiorari be granted.

In the instant case, the facts make clear that the Agent's testimony contained hearsay garnered from a confidential informant whom the prosecution failed to call at the trial. To incorporate the conclusions of the informant into its case, the prosecution began by introducing an extensive history by the agents to find the perpetrator who had escaped them on May 5, 1994, one and one-half years before petitioner Hector Aristis Almanzar Duran's arrest.

Agent Reyes testified at length to these efforts, including trips by himself and other agents to the locale where petitioner Hector Aristis Almanzar Duran was arrested and that neither he nor other agents went inside the bodega where petitioner Hector Aristis Almanzar Duran was arrested. (Tr. 244-247). Agent Reyes' testimony made clear that it was the confidential informant who had located and identified petitioner Hector Aristis Almanzar Duran in Washington Heights, New York on September 26, 1995. (Tr. 247-251). Apparently, by the time the *Wade* hearing was conducted, the confidential informant was now unfindable and unavailable to both sides.

Over objection, the agent testified that on the day of petitioner Hector Aristis Almanzar Duran's arrest, September 26, 1995, the confidential informant telephoned him and that he thereafter spoke with members of his group and his group supervisor before they went to pick-up the confidential informant. (Tr. 247-251). Testimony made clear that the confidential informant had located petitioner Hector Aristis Almanzar Duran and that he thereafter guided all the members of the group to petitioner Hector Aristis Almanzar Duran. (Tr. 247-251). This clearly told the jury that the non-testifying confidential informant located and identified petitioner Hector Aristis Almanzar Duran as the individual sought by the agents, and additionally, was critical to bolster extraordinarily limited identifications.

The prosecution was clearly aware that it had stepped over the line of admissibility, because thereafter the prosecutor went out of his way to point out that the informant did not say anything at the bodega itself. (Tr. 251). However, it was crystal clear that the informant had told the agents where to find petitioner Hector Aristis Almanzar Duran and provided a physical description of what he was wearing. This critical bolstering was necessary because it appears that other agents who were on the scene on both occasions were apparently unable to come forward to make any identification.

It is clear that the district court was concerned about this issue, as it noted in the record, that

> This issue of potential bolstering was very clearly in the court's mind, and I have a distinct recollection of [trial counsel] raising this question at a pretrial conference at some point . . . and I have an equally distinct memory of instructing [the prosecutor] that he walked a very fine line in insuring that there was no bolstering attempt.

(W. 2-4).

It is suggested the prosecution achieved through Agent Reyes' testimony what it could not otherwise have done, have the confidential informant identify petitioner Hector Aristis Almanzar Duran without calling him as a witness. This allowed the jury to draw improper conclusions from the proffered testimony and violated the petitioner's rights under the Due Process and Confrontation Clauses of the Fifth and Sixth Amendment. *See United States v. Check*, 582 F.2d 668 (2d Cir. 1978); *United States v. Figueroa*, 750 F.2d 232 (2d Cir. 1984). Accordingly, in light of the prejudicial admission of the observations and conclusions of the confidential informant incorporated in Agent Reyes' testimony, petitioner Hector Aristis Almanzar Duran's right to due process of law was violated, and a new trial should be ordered.

Agent Reyes testified that after he received the telephone call, he immediately picked-up the confidential informant with Special Agents Mike Cole and Carl Bell, and went to a location where petitioner Hector Aristis Almanzar Duran was arrested. It was clear the confidential informant had informed him the alleged participant of the May 5, 1994

transaction was standing on 142nd Street and Riverside Drive, Manhattan, New York. In responding to the confidential informant's information, Agent Reyes testified at the *Wade* hearing, "he mentioned to me that he was wearing dark brown or brownish jeans with a long-sleeved shirt, and that he was the individual who I had prior negotiations with." (W. 13). Clearly this information affected the independence of any identification that Agent Reyes had and more importantly made it impossible for the defense to cross-examine without further bolstering the prosecution's case with hearsay.

Nonetheless, Agent Reyes testified at trial that he observed petitioner Hector Aristis Almanzar Duran "approximately about 30 seconds, 45 seconds" before he made the identification on September 26, 1995. (Tr. 317; W. 16). Clearly the informant's description was the basis for the agents identification and the jury had every reason to so infer that the informant had identified petitioner Hector Aristis Almanzar Duran as the perpetrator. It should be noted that Agent Reyes testified he allegedly observed the perpetrator for only several minutes during a prolonged negotiation and transaction with others that occurred one and one-half years prior to petitioner Hector Aristis Almanzar Duran's arrest.

It is clear the agent had no independent recollection of the identity of the participant Agent Reyes allegedly observed on May 5, 1994 and relied only on the identification made by the confidential informant on September 26, 1995 to arrest petitioner Hector Aristis Almanzar Duran. More importantly with the manner in which the prosecutor conducted the examination of Special Agent Reyes, the jury could only conclude that the identification was the product of the confidential informant's description.

Significantly, Special Agent Carl Bell, who was in the car along with the confidential informant and Agent Reyes when he made the identification on September 26, 1995, was also with Agent Reyes on May 5, 1994 when the transaction occurred. The prosecution's representation to the court as well as the trial testimony made clear Agent Bell made no identification of petitioner Hector Aristis Almanzar Duran on September 26, 1995, apparently not recognizing petitioner Hector Aristis Almanzar Duran as the man sought from the May 5, 1994 transaction. (Tr. 11).

It was clear the informant was unavailable at the time of the trial. The record indicates that trial counsel attempted to contact the confidential informant through his counsel, but was unsuccessful. (Tr. 370, 428). The prosecution stated that it did not have control over the confidential informant, and called Special Agent Jones to confirm that fact, further signaling the jury as to why it should rely on the hearsay testimony of the informant. (Tr. 370-371). Just prior to the summations, the prosecution continued to make clear to the district court it could not locate the informant. The prosecution speculated to the court that, "Mr. De La Cruz might be in jail at the moment not on federal charges, but on state charges." (Tr. 429).

The prosecution in its summation highlighted the absence of the confidential informant, clearly telling the jury that informant's identification was correct and that had the confidential informant testified at trial he would have confirmed the prosecution's case. The prosecutor brazenly stated,

> You don't need the confidential informant to tell you this person is the right person. And while we are on the confidential informant, why isn't it that they didn't call the confidential informant? They don't have any obligation to call a witness, but don't you think that if the confidential informant would have helped them, they would have called the confidential informant?

(Tr. 472).

The prosecution hammered home the advantage gained from the absence of the confidential informant at trial and improperly shifted the burden to the defense by arguing that the defense would have called the confidential informant as a witness "if the confidential informant would have helped them". This was an improper negative inference for the jury to draw that was construed against the defense from the failure to produce the witness and was dishonest in that the prosecution knew the defense had attempted to locate and contact the informant but was unable to.

The prosecution had already extensively bolstered the confidential informant's hearsay statements during its direct case by having the agents

testify about the value of the confidential informant. Agent Reyes testified about critical aspects of the confidential informant's involvement in this case. Gratuitously, he told the jury:

> A confidential informant is someone that the DEA uses or, rather, a person who works for the DEA for purposes of providing intelligence information, such as introducing a DEA undercover agent to people in the narcotics business. *They are the people that we rely on to provide us this valuable source of information.*

(Emphasis added). (Tr. 201).

Agent Reyes further bolstered the confidential informant's credibility and the reliability of his observations and conclusions by testifying that the confidential informant's information provided in the instant case was so valuable that he was paid for it. (Tr. 201). It is suggested the only inference for the jury to draw from this testimony is that the confidential informant identified petitioner Hector Aristis Almanzar Duran for the agents and the agents then arrested petitioner Hector Aristis Almanzar Duran based on that information, because the confidential informant was so reliable.

In *United States v. Figueroa*, 750 F.2d 232, and *United States v. Check*, 582 F.2d 668, the United States Court of Appeals for the Second Circuit reversed convictions based upon the district court's failure to exclude tainted testimony which incorporated "inadmissible hearsay information obviously supplied by and emanating from the informant." *Figueroa*, 750 F.2d at 238; *Check*, 582 F.2d at 678. Both courts held the attempt to incorporate hearsay into the officer's testimony by an informant who did not testify, was "improper and cannot miraculously transform inadmissible hearsay into admissible evidence." *Id.* (Other citations omitted).

In *Check*, the prosecution's primary witness was an undercover detective, who, during his investigation of Check, a fellow police officer suspected of narcotics trafficking, worked closely with an informant who refused to testify at trial. The prosecution sought to introduce the content of the detective-informant conversations without engendering hearsay problems. That court determined that the prosecution's purpose

in offering the disputed testimony was to prove the truth of the matters asserted therein, not merely to testify as to what was said.

The situation in *Figueroa*, is analogous to both the instant case and *Check*. In *Figueroa*, testimony of an undercover detective was admitted reciting statements made by a police informant while the informant was making telephone calls to narcotic suspects in the detective's presence. In determining this testimony was inadmissible hearsay, petitioner Hector Aristis Almanzar Duran's conviction was reversed and the case remanded.

In the instant case, the unavailable confidential informant's testimony was critical to confirm that the agents had arrested the right suspect. More importantly, with the evidence introduced it was impossible to determine the suggestiveness of the identification and whether Agent Reyes had an independent recollection of petitioner Hector Aristis Almanzar Duran's identity without further highlighting the informant's identification. It is submitted the confidential informant's detailed description tainted any identification made of petitioner Hector Aristis Almanzar Duran on September 26, 1995. Additionally, the failure of Agent Reyes to immediately identify petitioner Hector Aristis Almanzar Duran after observing him on September 26, 1995 indicated the agent was not sure of his alleged identification of petitioner Hector Aristis Almanzar Duran even with the confidential informant's description.

The introduction of evidence which made crystal clear that the confidential informant had located and identified petitioner Hector Almanzar Duran as the perpetrator is specifically the type of evidence which required reversals under *Figueroa* and *Check*. Accordingly, it is respectfully requested that the Petition for a Writ of Certiorari be granted.

II.

TRIAL COUNSEL'S REPRESENTATION AND PERFORMANCE AT TRIAL VIOLATED THE PETITIONER'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND AFFECTED THE OUTCOME OF THE PETITIONER'S TRIAL.

Trial counsel's ineffective assistance to petitioner Hector Aristis Almanzar Duran in this case warrants that this Court grant his petition for a Writ of Certiorari. The trial record indicates trial counsel was frequently unprepared, failed to object at trial to similar act evidence,

failed to request critical hearings, frequently appeared confused and wandering, and during the course of his cross-examination, appeared to repeatedly concede that petitioner Hector Aristis Almanzar Duran was in fact the perpetrator sought by the agents. Additionally, it is raised in a separate point the trial counsel precluded petitioner Hector Aristis Almanzar Duran from testifying in his own defense, and it is urged that this is yet another example of trial counsel's ineffectiveness at trial.

The Second Circuit Court of Appeals did not specifically address this issue, relying only upon the flawed reasoning of the district court. Accordingly, it is requested that this court grant the Petition for a Writ of Certiorari to remedy this constitutional violation.

The arguments made to the district court and jury, and the cross-examination conducted by trial counsel often left both the bench and the prosecution confused as the what the defense was doing. Trial counsel's performance often compelled the district court to urge trial counsel to "move on", "control yourself a bit" or state, "I don't know where you are going with this . . . tie it up". This clearly undermined trial counsel's credibility with the jury. In fact, trial counsel's ineffective performance was further compounded by trial counsel's continual bolstering of Agent Reyes' testimony by repeatedly implicating his client in his questions as the individual who was sought by the agents.

Accordingly, it is submitted that trial counsel's assistance at trial was ineffective, and that but for trial counsel's ineffective assistance, the outcome of the trial would have been different[4]. *Strickland v. Washington*, 466 U.S. 687-88, 689-94, 104 S. Ct 2052 (1984).

A. Trial Counsel's Ineffective Representation

1. Trial counsel repeatedly implicated his own client during the inadequate and ineffective cross-examinations he conducted

Petitioner Hector Aristis Almanzar Duran's defense was further undermined by trial counsel during the cross-examination of Special Agent Rafael Reyes. Trial counsel repeatedly (Tr. 259, 260-262, 263,

4. Appellant counsel raised the issue of trial counsel's ineffective assistance of counsel before the district court as a Fed. R. Crim. P. Rule 33 motion, which was denied by the district court on December 19, 1996.

270, 309) could not effectively formulate questions for cross-examination and instead implicated petitioner Hector Aristis Almanzar Duran as the individual sought by the agents for the May 5, 1994 transaction. By conducting his cross-examination in this manner, trial counsel all but conceded his client was present at the location of the transaction, and further, implicated his client as participating in the charged transaction. Trial counsel's cross-examination actually bolstered Agent Reyes' testimony.

It is submitted, counsel's cross-examination supported the prosecution's theory of the case and rendered the trial a one-sided proceeding. The adversarial testing process spoken of in *Strickland*, was not present in this particular case. *See Strickland v. Washington*, 466 U.S. at 690.

2. The trial record shows frequent instances of trial counsel's lack of preparation

The trial record shows frequent instances of trial counsel's lack of preparation. One instance of this unpreparedness is indicated by trial counsel's failure to obtain the cooperating witness Pedro Gonzalez's financial affidavit which was filed with the district court to use during the cross-examination of the witness. (Tr. 84). The district court commented on this debacle by stating trial counsel should have requested this document the week before. (Tr. 105). As trial counsel was attempting to establish that the cooperating witness lied in a sworn document, he again undermined his own argument regarding the credibility of the witness due to his lack of preparation, while simultaneously undermining his own credibility with the jury. While he claimed to have seen the document, trial counsel never obtained a copy.

Also during trial, trial counsel raised for the first time that he did not have any notes from any proffer sessions the cooperating witness attended. (Tr. 105). This was clearly a critical aspect of the defense, that the cooperating witness did not get U.S.S.G. § 5K1.1 consideration until he implicated petitioner Hector Aristis Almanzar Duran as a participant in the May 5, 1994 transaction. Trial counsel was unprepared to effectively examine the cooperating witness on this issue.

This egregious mistake was compounded during cross-examination when it became apparent trial counsel did not adequately investigate the Fed. R. Evid., Rule 404(b) similar act evidence that was introduced to implicate petitioner Hector Aristis Almanzar Duran as a member of a drug distribution organization and as transacting three unrelated cocaine deals. (Tr. 49-58). The importance of this area became readily apparent in light of the fact cooperating witness Pedro Gonzalez only implicated petitioner Hector Aristis Almanzar Duran after the petitioner was arrested in September 1995, and after several proffer sessions were conducted with the prosecution. It appears that during these proffer sessions prior to petitioner Hector Aristis Almanzar Duran's arrest, no mention was made of the petitioner Hector Aristis Almanzar Duran, and cooperating witness Pedro Gonzalez was not offered cooperation with the prosecution. Accordingly, the timing and content of the proffer sessions with Pedro Gonzalez were critical to the defense. But as stated previously, trial counsel did not obtain the notes from the participants of the proffer sessions so any defense claim of recent fabrication by the witness could only be weakly alleged, instead of concretely proven.

The trial record additionally shows trial counsel seemed extremely confused over when and how many proffer sessions were conducted. This was also extremely important to the defense claim the cooperating witness Pedro Gonzalez recently fabricated his testimony to achieve 5K1.1 credit towards his sentence. The cooperating witness, after pleading guilty on August 23, 1995, was denied cooperation until after petitioner Hector Aristis Almanzar Duran was arrested. Between September 26, 1995 and December 27, 1995, the cooperating witness miraculously revealed for the first time that he knew the petitioner Hector Aristis Almanzar Duran and identified him as a narcotics dealer.

The aggregate effect of the many instances of trial counsel's lack of preparation compromised petitioner Hector Aristis Almanzar Duran's

3. The trial record shows instances where trial counsel appeared confused which required the court to intervene

A review of the trial record indicates that trial counsel's arguments clearly confused both the court and jury. One such example is when to the complete surprise of the court and the prosecution, trial counsel

demanded that tape recorded conversations 2T and 3T be played for the jury after he strenuously objected to their admission. (Tr. 256). This prompted the prosecution to state that he was "confused because Mr. Orden objected so we decided not to play the tape." The Court then instructed the jury, further undermining trial counsel's credibility, that,

> There's been a confusion about the [tape] situation. Mr. Orden had objected to the playing of this tape by the prosecution. The prosecution said it wouldn't play it. Now Mr. Orden wants to play it. I am permitting him to.

(Tr. 256).

Trial counsel was also admonished by the court on several other occasions, "to move on" (Tr. 300) and "I don't know where you are going with this" (Tr. 333) when his cross-examination was ineffective, repetitive and incomprehensible; "to control [him]self a bit" (Tr. 320) and to "lower [his] voice" (Tr. 330), when arguing with a witness; and lastly, "You're argument is almost incomprehensible" when making a confusing argument to the court regarding the identity of the individual who participated in the May 5, 1994 transaction. (Tr. 372). All of these admonitions undermined the defense, destroyed counsel's credibility with the jury and highlighted trial counsel's ineffectiveness.

4. Trial counsel failed to move for suppression of identifications made of photo-arrays at trial

In the instant case, trial counsel also failed to move for suppression of two pre-trial identifications made of photo-arrays testified about at trial identifying the petitioner Hector Aristis Almanzar Duran as the participant in the May 5, 1994 transaction who evaded arrest. Disquieting by its absence from the pre-trial identification hearing was any mention of the photo-arrays identified by Special Agent Namon Jones and cooperating witness Pedro Gonzalez in November and December 1995, respectively.

These identifications were testified about at trial (Tr. 63, 385) and were relied upon by the jury in determining whether petitioner Hector Aristis Almanzar Duran was indeed at the location of the transaction on May 5, 1994. The fact that no inquiry was made as to the circumstances surrounding these identifications is not only alarming because

constitutional violations may have occurred, but is also evidence that trial counsel did not properly prepare for trial.

5. Trial counsel failed to object to similar acts introduced in the prosecution's opening

Trial counsel failed to object to the prosecution's opening which stated, "This is a case about an individual who used the grocery store where he was working not to sell groceries but to buy and sell cocaine." (Tr. 15). This reference to narcotics dealings by petitioner Hector Aristis Almanzar Duran out of the grocery store or "bodega" was impermissible, as it did not relate to the charges in the indictment before the district court, but to the forthcoming testimony of cooperating witness Pedro Gonzalez regarding other transactions petitioner Hector Aristis Almanzar Duran allegedly conducted as a member of a drug distributing organization "Los Camposinos". (Tr. 46-58).

This inflammatory statement immediately indicated to the jury more than one transaction was conducted by petitioner Hector Aristis Almanzar Duran although only one transaction was charged in the indictment. In any event, these statements regarding the similar act evidence were made before trial counsel had an opportunity to explain his defense. It was therefore improper for the prosecution to comment regarding the similar act where it laid a specious foundation for the testimony of cooperating witness when no evidence should have been introduced about the similar acts on the prosecution's direct case.

The district court realizing that trial counsel did not object to the prosecution's opening attempted to avoid this issue by, *sua sponte* instructing the jury that this evidence was coming before the jury for background. (Tr. 21, 22). It is suggested, the admission of this evidence was improper because it only established propensity and the instruction only compounded the problem. Moreover, it is suggested that the district court failed to do the necessary balancing analysis required for admission under Fed. R. Evid. 404(b) and 403. (Tr. 21, 22).

The similar act evidence the prosecution used in its opening was not admissible to rebut defendant's claim he was not a participant in the May 5, 1994 transaction. These problems were compounded in the instant case by the late 404(b) notice of the similar act evidence the

prosecution intended to introduce which the district court noted on the record. (W. 2-7). This allowed cooperating witness Pedro Gonzalez to testify at trial and conclude that petitioner Hector Aristis Almanzar Duran was a member of Los Compesinos, a drug distributing organization, without establishing any basis for his testimony. (Tr. 46-47).

Additionally, the prosecution hammered this evidence home during its summation, in essence arguing petitioner Hector Aristis Almanzar Duran followed the same protocol for conducting the cocaine transaction on May 5, 1994 as he did in at least three other prior transactions, i.e. he did not touch the "stuff" or the money, and got others to drop-off the money and pick-up the drugs. (Tr. 442).

Moreover, it is suggested the admission of the these similar acts in the prosecution's case-in-chief during the direct examination of cooperating witness Pedro Gonzalez was erroneous. Allowing this "background testimony" about petitioner Hector Aristis Almanzar Duran 's alleged membership in a drug distribution organization and three uncorroborated transactions, amounted to little more than "propensity" testimony and was extremely prejudicial which required its preclusion. *See* Fed. R. Evid., Rules 404(b) and 403. (*See* Point III, *supra*).

B. The Petitioner Was Prejudiced By Trial Counsel's Unprofessional Errors

As stated in *Strickland*, a defendant should be granted a new trial when he can show that his trial counsel's representation fell below "an objective standard of reasonableness" under "prevailing professional norms," and "affirmatively prove prejudice," that is, demonstrate that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 687-88, 639-94, 104 S. Ct 2052 (1984); *United States v. Aguire*, 912 F.2d 555, 560 (2d Cir. 1990); *United States v. Reiter*, 897 F.2d 639, 644-45 (2d Cir.), *cert. denied*, 498 U.S. 817, 111 S. Ct. 59 (1990). As set forth above, it is suggested counsel's representation fell below an "objective standard of reasonableness under prevailing professional norms." *Id.*

With respect to the second prong of the *Strickland* test, there is little question that but for the errors of counsel, the outcome of the trial would have been different. The instant case turned on the identification

of petitioner Hector Aristis Almanzar Duran. The identifications made in the case by Special Agent Reyes flowed from the description and location of petitioner Hector Aristis Almanzar Duran given by the confidential informant on September 26, 1995 as the individual who participated in the May 5, 1994 transaction.

Agent Reyes' reliance on these untested observations and conclusions of the confidential informant allowed the jury to infer that the confidential informant positively identified petitioner Hector Aristis Almanzar Duran when it is obvious his identification relied upon the confidential informant's description.

The failure to properly prepare his cross-examination by investigating the cooperating witness' background and criminal history, did not illustrate to the jury what is apparent from reading the record in this case, that Pedro Gonzalez lied in order to receive cooperation credit toward his sentencing. Additionally, by not holding a pre-trial hearing to determine the suggestiveness of the identifications made of the photo-arrays, counsel clearly failed to effectively controvert important identification evidence inculpating petitioner Hector Aristis Almanzar Duran.

The record establishes that this case turned on incredible and often uncontroverted testimony. Despite this thin reed of evidence, trial counsel did little to undermine that supposed "proof". At trial, the prosecution contended that petitioner Hector Aristis Almanzar Duran participated in an alleged conspiracy to distribute and possess with intent to distribute one kilogram and more of cocaine. Virtually the only evidence of that participation was the testimony of the biased cooperating witness and the tainted testimony of Agent Reyes. It can not therefore be said that counsel's errors did not affect the outcome of the trial. Accordingly, it is requested that this court grant petitioner Hector Aristis Almanzar Duran's petition for a Writ of Certiorari to remedy the violation of his Fifth and Sixth Amendment rights.

III.

THE ADMISSION OF SIMILAR ACT EVIDENCE REGARDING OTHER NARCOTICS SALES PURSUANT TO FED. R. EVID. 404(b) AND 403 WAS CLEARLY ERRONEOUS.

Trial counsel failed to object to the prosecution's opening which stated, "This is a case about an individual who used the grocery store where he was working not to sell groceries but to buy and sell cocaine." (Tr. 15). This reference to narcotics dealings by petitioner Hector Aristis Almanzar Duran out of the grocery store or "bodega" was impermissible, as it did not relate to the charges in the indictment before the district court, but to the forthcoming testimony of cooperating witness Pedro Gonzalez regarding other transactions petitioner Hector Aristis Almanzar Duran allegedly conducted as a member of a drug distributing organization "Los Camposinos". (Tr. 46-58).

This inflammatory statement immediately indicated to the jury more than one transaction was conducted by petitioner Hector Aristis Almanzar Duran although only one transaction was charged in the indictment. In any event, these statements regarding the similar act evidence were made before trial counsel had an opportunity to explain his defense. It was therefore improper for the prosecution to comment regarding the similar act where it laid a specious foundation for the testimony of cooperating witness when no evidence should have been introduced about the similar acts on the prosecution's direct case.

Other than holding that the evidence was properly admitted as background information, the Second Circuit Court of Appeals did not specifically address this issue. Accordingly, it is requested that this court grant the Petition for a Writ of Certiorari to remedy this constitutional violation.

The district court realizing that trial counsel did not object to the prosecution's opening attempted to avoid this issue by, *sua sponte* instructing the jury that this evidence was coming before the jury for background. (Tr. 22). It is suggested, the admission of this evidence was improper because it only established propensity and the instruction only compounded the problem. Moreover, it is suggested that the district court failed to do the necessary balancing analysis required for admission under Fed. R. Evid. 404(b) and 403. (Tr. 21, 22).

The similar act evidence the prosecution used in its opening was not admissible to rebut defendant's claim he was not a participant in the May 5, 1994 transaction. These problems were compounded in the instant case by the late 404(b) notice of the similar act evidence the prosecution intended to introduce which the district court noted on the record. (W. 2-7). This allowed cooperating witness Pedro Gonzalez to testify at trial and conclude that petitioner Hector Aristis Almanzar Duran was a member of Los Compesinos, a drug distributing organization, without establishing any basis for his testimony. (Tr. 46-47).

Additionally, the prosecution hammered this evidence home during its summation, in essence arguing petitioner Hector Aristis Almanzar Duran followed the same protocol for conducting the cocaine transaction on May 5, 1994 as he did in at least three other prior transactions, *i.e.* he did not touch the "stuff" or the money, and got others to drop-off the money and pick-up the drugs. (Tr. 442).

Moreover, it is suggested the admission of the these similar acts in the prosecution's case-in-chief during the direct examination of cooperating witness Pedro Gonzalez was erroneous. Allowing this "background testimony" about petitioner Hector Aristis Almanzar Duran's alleged membership in a drug distribution organization and three uncorroborated transactions, amounted to little more than "propensity" testimony and was extremely prejudicial which required its preclusion. *See* Fed. R. Evid., Rules 404(b) and 403.

It is submitted that if a voir dire of the cooperating witness was conducted, trial counsel would have established that cooperating witness Pedro Gonzalez did not have a proper basis to testify about prior transactions allegedly participated in by petitioner Hector Aristis Almanzar Duran. Accordingly, this extremely prejudicial and inflammatory "propensity" evidence was improperly considered and evaluated by the jury in determining petitioner Hector Aristis Almanzar Duran's innocence. It is submitted that this testimony should have been precluded at trial under both Fed. R. Evid. 404(b) and 403.

It is questionable whether these transactions ever happened, or whether cooperating witness Pedro Gonzalez fabricated this story for leniency from the prosecution for his own criminal convictions. *See United States v. Afjehei*, 869 F.2d 670 (2d Cir. 1989) (Evidence that

defendant, charged with bringing heroin into the country, had gone abroad on several occasions should not have been admitted under Rule 404(b) in the absence of showing such trips were drug related); *United States v. Gilan*, 967 F.2d 776 (2d Cir. 1992) (Convictions for conspiracy and theft reversed because trial court wrongly admitted other crimes evidence under Fed. R. Evid. 404(b) where there was no evidence that the petitioner committed other crime, even though it was very similar to the crime charged in the indictment.) It is clear that Pedro Gonzalez was not offered cooperation until after petitioner Hector Aristis Almanzar Duran's arrest despite several proffer sessions with the prosecution prior to September 1995. It is submitted that the question regarding whether these transactions testified to by cooperating witness Pedro Gonzalez actually occurred is substantial, and required their preclusion under Fed. R. Evid. 404(b) because of the danger that this testimony was only used by the jury as evidence of propensity.

Under all circumstances, Pedro Gonzalez's testimony regarding these historical transactions should have been precluded under Fed. R. Evid. 403. *See United States v. Afjehei*, 869 F.2d 670 (Even if otherwise relevant, evidence of other trips defendant took abroad should have been excluded under Rule 403). When admitted at trial, this testimony only inflamed the jury and confused them regarding the instant charges. The jury's temptation to convict based on the amount of evidence introduced, rather than the questionable evidence introduced to prove the instant charges, warranted the preclusion of this testimony pursuant to Fed. R. Evid. 403. Moreover, it is suggested that the district court failed to conduct the proper balancing test required under Fed. R. Evid. 403.

Fed. R. Evid. 404(b) states:

> **(b) Other crimes, wrongs, or acts.** Evidence
>
> of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . .

The general bad character of a defendant is not an issue and is not admissible at trial. Thus, the basic rule is that evidence of other crime is only admissible if it is relevant for some purpose other than merely to show a defendant's character, provided that its potential for prejudicing the defendant does not outweigh its probative value. *See United States v. Pitre*, 960 F.2d 1112, 1119 (2nd Cir. 1992) (The district court must determine if the evidence is being offered for a proper purpose, other than to prove the defendant's bad character or criminal propensity. If the evidence is offered for a proper purpose, the district court must next determine if the evidence is relevant to an issue in the case, and, if relevant, whether its probative value is substantially outweighed by the danger of unfair prejudice. Finally, upon request, the district court must give an appropriate limiting instruction to the jury.)

Evidence under Rule 404(b) is subject to a Rule 403 balancing test and the prosecution must prevail on a four-part analysis: (a) the prosecution **must** show by evidence "sufficient to support a finding" that petitioner Hector Aristis Almanzar Duran committed the other acts (*See Huddleston v. United States*, 485 U.S. 681, 108 S. Ct. 1496 (1988)); (b) the prosection **must** prove that the other acts evidence is relevant on a disputed issue in the case; (c) that the prosecution has a need for the evidence; and (d) that the probative value of the evidence is not substantially outweighed by the prejudice to the defendant. *See e.g. United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977).

It is suggested the uncharged similar act evidence admitted at trial prejudiced petitioner Hector Aristis Almanzar Duran, whereby his guilt was determined not upon culpable conduct, but upon the multitude of bad acts the prosecution put before the jury. It was clearly a difficult task for the jury to follow the evidence and testimony and comprehend its proper use against petitioner Hector Aristis Almanzar Duran as defined by the indictment. The jury, unable to differentiate against the proper use of the evidence, found petitioner Hector Aristis Almanzar Duran guilty on the sheer volume of evidence the prosecution introduced at petitioner Hector Aristis Almanzar Duran's trial.

While the district court attempted to guide the jury as to the proper use of the evidence against petitioner Hector Aristis Almanzar Duran, (Tr. 21, 22), counsel submits the jurors will remained confused as to the

appropriate use of the evidence against petitioner Hector Aristis Almanzar Duran. It is submitted, the admission of the uncharged act evidence caused the defense a burden they were hard pressed to overcome.

Accordingly, petitioner Hector Aristis Almanzar Duran respectfully requests that this court grant the Petition for a Writ of Certiorari.

IV.

THE DENIAL OF PETITIONER HECTOR ARISTIS ALMANZAR DURAN'S RIGHT TO TESTIFY IN HIS OWN DEFENSE AT TRIAL VIOLATED HIS RIGHT TO DUE PROCESS OF LAW.

Both prior to and during his trial, petitioner Hector Aristis Almanzar Duran, specifically stated to his trial counsel that he wished to testify in his own defense at trial to contradict the prosecution's case. (Affidavit of petitioner Hector Aristis Almanzar Duran). This was specifically necessary to explain to the jury that he was not the individual the agents sought for participating in a transaction for several kilograms of cocaine in May 1994. The issue about petitioner Hector Aristis Almanzar Duran testifying at trial was discussed on other occasions between petitioner Hector Aristis Almanzar Duran, his wife Awilda Almanzar-Duran, and trial counsel.

Trial counsel on every occasion said that he did not want petitioner Hector Aristis Almanzar Duran to testify. Moreover, trial counsel never told petitioner Hector Aristis Almanzar Duran, nor was the petitioner aware, that the decision to testify was the defendant's decision alone, and that trial counsel could not stop him from testifying on his own behalf without violating his Fifth and Sixth Amendment rights.

The Second Circuit Court of Appeals did not specifically address this issue, relying only upon the flawed reasoning of the district court. Accordingly, it is requested that this court grant the Petition for a Writ of Certiorari to remedy this constitutional violation.

Prior to sentencing, the district court held a hearing on March 6, 1997, where petitioner Hector Aristis Almanzar Duran testified about his desire to testify and his discussions with trial counsel about this issue. Much of what petitioner Hector Aristis Almanzar Duran testified

to was corroborated by his wife. Trial counsel also testified, and contradicted petitioner Hector Aristis Almanzar Duran's testimony about the fact that trial counsel informed petitioner Hector Aristis Almanzar Duran that the right to testify was his.

Petitioner Hector Aristis Almanzar Duran's testimony was critical to refute the prosecution's theory of the case and should have been considered by the jury in determining innocence. Petitioner Hector Aristis Almanzar Duran's testimony was necessary specifically to contradict the allegation that he agreed to distribute narcotics, when he did not know the individuals he allegedly conspired with. It is therefore submitted that petitioner Hector Aristis Almanzar Duran's proffered testimony was material, non-cumulative of other testimony given at trial, and was the only available source to establish petitioner Hector Aristis Almanzar Duran's innocence.

Accordingly, in light of the Fifth and Sixth Amendment violations of petitioner Hector Aristis Almanzar Duran's right to testify on his own behalf because his trial counsel precluded him from taking the stand, invalidating any waiver of his rights, petitioner Hector Aristis Almanzar Duran requests this Court grant the Petition for a Writ of Certiorari. Additionally, it is suggested that this is an additional basis for this Court to determine trial counsel's ineffectiveness at trial.

It is well settled that a basic premise of constitutional criminal law is that the accused retains the right to be heard in his own defense. *Rock v. Arkansas*, 483 U.S. 44, 51, 107 S. Ct. 2704 (1987). The Court has recognized it as both a constitutional and statutory right. *United States v. Bifeld*, 702 F.2d 342, 349 (2d Cir. 1983). The accused, rather than counsel, retains the ultimate authority to decide whether to exercise or waive his right to testify in his own behalf. *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308 (1982). Accordingly, any waiver of an accused's right to testify must be knowing, intelligent and voluntary. *United States v. Teague*, 953 F.2d 1525, 1532 (11th Cir. 1992) (*en banc*); *See also Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019 (1938). Where as here, trial counsel precluded petitioner Hector Aristis Almanzar Duran from testifying, and the petitioner did not therefore make a valid waiver of his right to testify, a new trial.

In the instant case, when petitioner Hector Aristis Almanzar Duran and trial counsel met prior to trial, petitioner Hector Aristis Almanzar Duran stated to trial counsel that he wanted to testify in his own defense. Trial counsel would rebuke petitioner Hector Aristis Almanzar Duran's request. Trial counsel's responses to petitioner Hector Aristis Almanzar Duran's requests to testify made it clear to petitioner Hector Aristis Almanzar Duran that trial counsel would not let him testify. To his detriment, petitioner Hector Aristis Almanzar Duran did not understand that the decision regarding whether he testified at trial was a decision that only he was empowered to make. At no time during his testimony could trial counsel point to a specific discussion with petitioner Hector Aristis Almanzar Duran informing him that he had a constitutional right to take the stand and bring his case to the jury.

Discussions about trial counsel's decision to preclude petitioner Hector Aristis Almanzar Duran from testifying at trial were also conducted between trial counsel and petitioner Hector Aristis Almanzar Duran's wife, Awilda Almanzar-Duran. In a telephone conversation prior to trial, trial counsel spoke with Mrs. Almanzar-Duran and told her that he did not want petitioner Hector Aristis Almanzar Duran to testify at trial. Mrs. Almanzar-Duran was surprised about this because of her knowledge that her husband indicated to counsel that he wanted to take the stand in his own defense. A similar conversation between Mrs. Almanzar-Duran and trial counsel was conducted during the trial, and again trial counsel dismissed the idea of petitioner Hector Aristis Almanzar Duran testifying at trial. It was understood by both petitioner Hector Aristis Almanzar Duran and his wife that trial counsel was firm in his decision that petitioner Hector Aristis Almanzar Duran would not testify.

During trial, petitioner Hector Aristis Almanzar Duran constantly stated to trial counsel that he wanted to testify. Specifically, after the testimony of each agent on the prosecution's direct case, petitioner Hector Aristis Almanzar Duran would indicate to trial counsel that he wanted to testify so he could contradict the testimony against him. When Pedro Gonzalez testified, petitioner Hector Aristis Almanzar Duran again expressed to trial counsel that he had to take the stand because he did not know cooperating witness Pedro Gonzalez. Petitioner Hector Aristis Almanzar Duran was the only source of testimony which could contradict

the baseless testimony of Pedro Gonzalez which was clearly motivated by cooperating witness Pedro Gonzalez's desire to receive a U.S.S.G. § 5K1.1 letter from the prosecutor to reduce his sentence.

It is submitted that petitioner Hector Aristis Almanzar Duran suffered tremendous prejudice from trial counsel's decision to preclude him from testifying on his own behalf in light of the lack of credible evidence of petitioner Hector Aristis Almanzar Duran's participation in the charged narcotics conspiracy. (*See* Points I & II, *infra*).

Petitioner Hector Aristis Almanzar Duran's own testimony was necessary to convince the jury that he was not involved in this conspiracy. It is clear that petitioner Hector Aristis Almanzar Duran's trial counsel's ineffective assistance was insufficient to meet the prosecution's case. Trial counsel's mistakes were only magnified without the testimony of the individual who could best establish that petitioner Hector Aristis Almanzar Duran did not agree with any individual on May 5, 1994 to distribute narcotics; the testimony of petitioner Hector Aristis Almanzar Duran. It is suggested that petitioner Hector Aristis Almanzar Duran's testimony would establish the lack of any agreement between petitioner Hector Aristis Almanzar Duran and the alleged co-conspirators whom he does not know, and would therefore affect the outcome of the trial. The preclusion of this critical testimony should not therefore be considered harmless.

Accordingly, it is respectfully submitted that this Court set aside the verdict of guilt and grant petitioner Hector Aristis Almanzar Duran a new trial in light of the violation of petitioner Hector Aristis Almanzar Duran's right to testify in his own defense, when he was precluded from testifying by his trial counsel. It is submitted that with petitioner Hector Aristis Almanzar Duran's testimony, a reasonable mind would have a reasonable doubt as to whether petitioner Hector Aristis Almanzar Duran participated in the charged narcotics offense. Accordingly, the Petition for a Writ of Certiorari should be granted.

CONCLUSION

WHEREFORE, it is respectfully requested that this Court issue a Writ of Certiorari to review the judgment and opinion of the Second Circuit Court of Appeals in this matter.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED DECEMBER 17, 1997

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 17th day of December, one thousand nine hundred and ninety-seven.

PRESENT:

Hon. Frank X. Altimari,
Hon. John M. Walker, Jr.,
Hon. José A. Cabranes,
Circuit Judges.

Appendix A

No. 97-1189

UNITED STATES OF AMERICA,

Appellee,

v.

PEDRO ANTONIO GONZALES, ANGEL DURAN, JORGE DURAN,

Defendants,

HECTOR ARISTIS ALMANZAR DURAN, a/k/a Aristides,

Defendant-Appellant.

* * *

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard from the United States District Court for the Southern District of New York (Sotomayor, *J.*) and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be and it hereby is affirmed.

Defendant-appellant Hector Aristis Almanzar-Duran ("Almanzar-Duran") appeals from the March 20, 1997 judgment of conviction of the district court following jury trial, for

conspiring to distribute and possess with intent to distribute approximately four kilograms of cocaine in violation of 21 U.S.C. § 846, and sentencing Almanzar-Duran to a term of 168 months' incarceration and eight years' supervised release.

In particular, Almanzar-Duran claims, *inter alia*, (i) that the district court improperly admitted certain evidence at trial, (ii) that he received ineffective assistance of counsel, (iii) that his trial counsel failed to inform him of his right to testify at trial, and (iv) that the district court improperly imposed a two-level upward adjustment under U.S.S.G. § 3C1.1 for obstruction of justice.

Almanzar-Duran claims that the district court should have excluded testimony from the Officer Agent Reyes ("Reyes"), relating that a confidential informant had contacted Reyes before Reyes identified Almanzar-Duran as a member of the drug conspiracy with whom the agent had transacted in drugs seventeen months earlier. Almanzar-Duran also objects to the admission of prior similar act evidence. We review both evidentiary rulings for abuse or discretion. *See United States v. Thai.*, 29 F.3d 785, 813 (2d Cir. 1994). As to the confidential informant, we agree with the district court that the "information elicited by the government was necessary background information to explain the presence of the police officers at the scene and to give context to what occurred . . . ." Agent Reyes did not testify about the content of any conversation with the informant and was in no sense " 'a transparent conduit for the introduction of inadmissible hearsay information obviously supplied by and emanating from [an] informant.' " *United States v. Figueroa*, 750 F.2d 232, 239 (2d Cir. 1984) (quoting *United States v. Check*, 582 F.2d 668, 678 (2d Cir. 1978)).

Appendix A

Almanzar-Duran claims that Fed. R. Evid. 404(b) prohibited the introduction of evidence regarding three prior cocaine sales he made to accomplice Pedro Gonzalez. "[E]vidence of prior crimes, wrongs or acts is admissible for any purpose other than to show a defendant's criminal propensity," *United States v. Lasanta*, 978 F.2d 1300, 1307 (2d Cir. 1992) (internal quotation marks and citations omitted), unless the probative value of the proffered evidence is "substantially outweighed by the danger of unfair prejudice." *United States v. Zackson*, 12 F.3d 1178, 1182 (2d Cir. 1993). The evidence here was properly admitted as background information to explain the development of Almanzar-Duran's criminal relationship with his coconspirators, *see, e.g., United States v. Pipola*, 83 F.3d 556, 566 (2d Cir. 1996), as well as to support the basis for Gonzalez' ability to identify the defendant as the participant in the May 5, 1994 transaction at issue. Moreover, the district court properly instructed the jury to consider those prior acts only for the limited purpose of establishing Almanzar-Duran's identity and of understanding the background of his relationship with the other defendants and not for defendants' propensity to commit crimes.

For the reasons stated by the district court, Almanzar-Duran did not receive ineffective assistance of counsel at trial, and even if he did, was not prejudiced by such. Moreover, for the reasons stated by the district court, Almanzar-Duran's trial counsel did not deny him the right to testify in his defense nor fail to inform Almanzar-Duran of his right to testify.

Finally, the district court properly imposed a two-level upward departure under U.S.S.G. § 3C1.1 because Almanzar-Duran "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation,

prosecution, or sentencing of [his] offense" by falsely testifying at a post-trial hearing that his lawyer never advised him of his right to testify. We review the district court's findings of fact for clear error and give "due deference to the district court's application of the guidelines to the facts." *United States v. Davis*, 967 F.2d 84, 88–90 (2d Cir. 1992) (internal quotation marks and citations omitted). A defendant is subject to the enhancement under this Guideline if he "commit[s] . . . perjury." Application Note 3(b) to § 3C1.1. The district court found by clear and convincing evidence that Almanzar-Duran committed perjury at the post-trial hearing when he claimed that his trial counsel never informed him of his right to testify. In light of the substantial evidence presented at the post-trial hearing that Almanzar-Duran had been informed by trial counsel of his right to testify, we cannot find that the district court clearly erred in granting the upward departure.

We have carefully considered Almanzar-Duran's remaining arguments and find them to be without merit. Accordingly, we affirm the judgment of the district court.

FOR THE COURT:

s/ Lucille Carr
GEORGE LANGE III, Clerk
by: Lucille Carr, Deputy Clerk

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MARCH 20, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case Number: 1:94CR00300-004

(For Offenses Committed On or After November 1, 1987)

Barry E. Schulman
Defendant's Attorney

UNITED STATES OF AMERICA

v.

HECTOR ALMANZAR-DURAN

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT:

☒ was found guilty on count(s) after a plea of not guilty . . . as charged, after a Jury Trial.

Title & Section

21 U.S.C. 841

Nature of Offense

Conspiracy to Possess and Distribute a Controlled Substance

Appendix B

Date Offense Concluded

05/05/1994

Count Number(s)

1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 105-74-8972
Defendant's Date of Birth: 12/06/1966
Defendant's USM No.: 42709-054
Defendant's Residence Address:
640 Riverside Drive,
Apartment 4F
New York, NY 10031
Defendant's Mailing Address:
640 Riverside Drive,
Apartment 4F
New York, NY 10031

Appendix B

03/19/1997
Date of Imposition of Judgment

s/ Sonia Sotomayor

Hon. Sonia Sotomayor, U.S.D.J.
Name & Title of Judicial Officer

3/20/97
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 168 month(s).

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 8 year(s). (See additional Page)

* * *

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the

commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

* * *

ADDITIONAL SUPERVISED RELEASE TERMS

While on Supervised Release the Defendant shall submit to drug testing as demanded by the Probation Department. The Defendant shall also continue to make payments on the fine imposed at a rate of 10% of his gross monthly income.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	*Fine*	*Restitution*
Totals:	**$ 50.00**	**$ 2,500.00**	**$**

* * *

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $_____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ The interest requirement is waived.

* * *

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A. ☒ In full immediately

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

The $50.00 Special Assessment imposed shall be due immediately. The $2,500.00 Fine imposed shall be paid at the

rate of 10% of the Defendant's gross monthly earnings while in prison or, at a rate calculated under the Inmate Financial Responsibility Program, whichever is the lesser.

Upon release from prison, the Defendant shall continue to make payments at the rate of 10% of his gross-monthly income.

* * *

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): (See additional Page)

See Additional Factual Findings and Guideline Application Exceptions — Sheet 6.01

Guideline Range Determined by the Court:

Total Offense Level: 34

Criminal History Category: II

Imprisonment Range: 168 to 210 months

Supervised Release Range: 8 to — years

Fine Range: $17,500.00 to $4,000,000.00

☒ Fine waived or below the guideline range because of inability to pay.

* * *

Appendix B

ADDITIONAL FACTUAL FINDINGS AND GUIDELINE APPLICATION EXCEPTIONS

The Court accepts the factual findings and offense level calculation of the pre-sentence report except for the corrections indicated in Defense counsel's letter addressed to the Probation Department, dated June 14, 1996, and

the Court enhances the Offense Level by 2 points raising it from 32 to 34 under Sec. 3C1.1 for obstruction of justice.

APPENDIX C — CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX D — RULES INVOLVED

Rule 403 Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404 Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case, shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.